

NTSB Order No.  
EM-29

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 25th day of April 1973.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

ALVIN SMITH, Appellant.

OPINION AND ORDER

The appellant seeks modification of the Commandant's decision affirming the revocation of his merchant mariner's document (No. Z-1178670) and all other seaman's documents for misconduct aboard ship.<sup>1</sup> He was serving at the time of the incident as chief cook on the SS STEEL ADVOCATE, while the vessel was docked at the port of Galveston, Texas.

Appellant's prior appeal to the Commandant (Appeal No. 1892) was from the initial decision of Administrative Law Judge Clint J. Livingston, rendered after a full evidentiary hearing.

<sup>2</sup> Throughout these proceedings, appellant has been represented by his own counsel.

The law judge found that on January 23, 1971, the appellant intentionally stabbed another crewmember, Messman John O. Harrell, with a meat fork which measured approximately 18 inches in length and had 3 to 3 1/2-inch prongs. He further found that the meat fork was a dangerous weapon and that appellant had wrongfully assaulted and battered Harrell with such weapon. Appellant admitted the stabbing but raised accident as a defense.

The incident took place in the ship's galley shortly before 5:00 p.m. supper hour. Appellant was using the meat fork, held in

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<sup>1</sup>The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The appeal to this Board is authorized under 49 U. S. C. 1654(b)(2).

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his left hand, in preparing meat at one of the stoves. He testified that Harrell came to the doorway on his left-hand side, "maybe 4 or 5 feet" away, and told him to hurry up because a woman was waiting for him in town. In appellant's version of the ensuing events, Harrell was loud and rude, appeared to be intoxicated, so he told him to leave; then, as they "talked back and forth," he turned and swung his left hand, "gesturing" with the fork, and Harrell "moved forward, unknown to [him] and this fork struck him in the ...chest area" (Tr. 44-45).

In Harrell's version, he was standing 6 feet away when appellant, objecting with vile language when he asked whether the food was ready, came toward him waving the meat fork. At first, he thought appellant was "using [the fork] as a figure of speech--not as a threat" but suddenly appellant lunged at him and stuck the fork into his chest (Tr. 32, 34, 38-39).

No witnesses other than these principals testified concerning the episode. However, one of the attending physicians, during Harrell's subsequent hospitalization, testified that the two puncture wounds Harrell had sustained from the prongs of the fork caused inflammation of the pericardium and pleura, which "would not require a very deep penetration. A penetration of only an inch or two could do damage of this type" (Tr. 12). The law judge found it "inconceivable" that Harrell would have walked into the fork as appellant claimed, so as to cause wounds of this depth.

After making his findings, the law judge was advised of appellant's good record during the previous 7 years of merchant marine service. Ignoring this favorable factor in his initial decision, he imposed the revocation order, concluding that appellant's offense was "a very serious infraction of the rules of discipline required to promote safety at sea." The Commandant, on review, held that appellant's good prior record was duly considered by the law judge at the hearing, and sufficient reasons were then given by him for not reducing the order.<sup>3</sup>

In his brief on appeal, appellant contends that there is no proof that the fork was a dangerous weapon, that the evidence on the manner of its use is insufficient because Harrell "had been drinking," and that the revocation order is too severe in view of his good prior record. He further asserts that Harrell is a convicted procurer and dope addict, and invites us to check the police records in his own hometown to show that he has never

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<sup>3</sup>The reasons given by the law judge were "the seriousness of...the acts committed here" and the harm done to the victim without "just provocation" (Tr. 57).

assaulted anybody<sup>4</sup> On the basis of these various contentions and arguments, appellant urges the Board to reduce the order "to a suspension and/or allow him to return to sea on a probationary basis." Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, the Board concludes that the findings of the law judge are supported by reliable, probative, and substantial evidence, as well as by the weight of the evidence. We adopt the findings of the judge and the Commandant as our own, to the extent not modified herein. Moreover, we agree that revocation is warranted under 46 U. S. C. 239(b) and applicable Coast Guard regulations issued thereunder.<sup>5</sup>

It serves no purpose to argue, as does appellant, that a meat fork is not a dangerous weapon per se, and that it fits no statutory definition of a dangerous weapon. Rather, the determination in this case rests on whether the instrument, although not dangerous per se, is one likely to produce death or

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<sup>4</sup>Appellant does not raise on this appeal his further contentions before the Commandant that all possible witnesses were not called to testify, and the Harrell somehow enlarged his wounds. In any event, we find they are properly disposed of as being without merit.

<sup>5</sup>46 CFR Section 137.03-5 provides, in pertinent part, as follows: § 137.137.03-5 Offenses for which revocation of licenses or documents is sought.

(a) The Coast Guard will initiate administrative action seeking revocation of licenses, certificates or documents held by persons who have been involved in acts of such serious nature that permitting such persons to sail under their licenses, certificates and documents would be clearly a threat to the safety of life or property.

(b) These offenses, which are deemed to affect safety of life at sea, the welfare of seamen or the protection of property aboard ship, are:

(1) Assault with dangerous weapon (injury)."

46 CFR Section 137.20-165 gives a table of disciplinary sanctions for various types of seamen's offenses "for the information and guidance of examiners." Assault with a dangerous weapon (injury) is listed as warranting the sanction of revocation on the first offense.

serious bodily under the circumstances of its use.<sup>6</sup> We find ample proof that the meat fork constituted a dangerous weapon in Harrell's testimony on the manner of its use and in the doctor's testimony concerning the wounds he sustained.

Appellant's defense relies on a lack of intent to injure on his part, but we are not persuaded to disturb the law judge's contrary finding on this crucial issue. In our view, the Commandant's finding that appellant was angered by Harrell is the only fair inference to be drawn from all of the testimony concerning the events leading up to the actual stabbing. We are also dissuaded by appellant's evasiveness under examination by the law judge, giving variant descriptions of the type of movement Harrell made when he supposedly hit himself on the fork<sup>7</sup> Finally, we rejected appellant's argument that if he had intended to use the fork as a dangerous weapon, "it is only logical to assume that he would have struck Harrell more than once."

In contrast, Harrell gave consistent testimony throughout a full cross-examination. The argument of appellant that Harrell's account makes the assault appear unintentional is mounted by the device of selecting excerpts out of context and is without merit. Nor was there proof of intoxication on Harrell's part at the time of the stabbing incident. Although he admitted drinking rum earlier in the afternoon, this was not shown to have impaired his powers of recollection, nor does it render appellant any less culpable, as the latter argues. On the contrary, we are convinced upon review of the hearing record that appellant was provoked to violence by the vexatious but harmless antics of Harrell, that this alone was his reason for injuring Harrell with the meat fork, and that the defense of stabbing by accident is implausible under all of the circumstances. Harrell's prior criminal record, if any, is not a part of the record and has no bearing in this case.

Finally, we are not disposed to reduce the sanction because of appellant's good record as a seaman. His misconduct in this instance shows that he may react violently if confronted by provocation of a low order. His violent disposition would continue

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<sup>6</sup> 6 C.J.S. Assault and Battery § 77c.

<sup>7</sup>When asked by the law judge how Harrell had moved into the fork, he first replied: "He was--you know,, he was real--he was--he wasn't even standing still--he was moving around--he acted like somebody who was--who was losing their mind or something really." When pressed for some description, he finally answered that he had turned with the fork after seeing him move out of the corner of his eye. (Tr. 51-52.)

to threaten the safety and welfare of other crewmembers with whom he would server. We agree. We agree with the various findings of the law judge had the Commandant, in assessing sanction, that appellant Harrell without just provocation, that the injuries were serious<sup>8</sup> and could easily have resulted in death, and that such an act of violence requires revocation, regardless of prior good conduct.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The orders of the Commandant and the administrative law judge revoking appellant's seaman's documents be and they are hereby affirmed.

REED, Chairman, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order. McADAMS, Member, did not participate.

(SEAL)

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<sup>8</sup>We do not agree with the law Judge's ruling which curtailed the doctor's testimony on "the degree of seriousness" of Harrell's wounds(Tr. 7-9). However, this only prejudiced the presentation of the case and does not, as appellant argues, preclude our consideration of the residual effect of the stabbing (inflammation of the pericardium the pleura of the left lung) as testified by the doctor and accepted by the law judge.